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Gupta, J.

published in

Review of European Community & International Environmental Law
2007

DOI (link to publisher)

[10.1111/j.1467-9388.2007.00541.x](https://doi.org/10.1111/j.1467-9388.2007.00541.x)

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

Gupta, J. (2007). Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change. *Review of European Community & International Environmental Law*, 16(1), 76-86. <https://doi.org/10.1111/j.1467-9388.2007.00541.x>

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Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change

Joyeeta Gupta

This article examines the recent academic interest in litigation as a tool to address climate change, as well as the surge of legal actions worldwide to bring the problem to the attention of judiciaries. This new interest reveals the frustration of legal scholars and activists at the slow rate at which policy makers are addressing the climate change problem. This article shows the slow build-up of academic interest in litigation, before moving on to analyse the kinds of legal causes of action that are being used in different parts of the world. Most of these cases have not been fully resolved, and it is more than likely that the judgments may not always be favourable to the plaintiffs, but at least a first step has been made to involve yet another forum for addressing the climate change problem.

INTRODUCTION

Climate change governance can be depicted as a growing set of symmetric or asymmetric concentric circles of governance, where even actions that are seen as ostensibly independent are either rooted in, or develop in reaction to, the core governance framework. At the core of this governance framework is the United Nations Framework Convention on Climate Change (UNFCCC),¹ its Kyoto Protocol² and the numerous decisions of the UNFCCC Conference of the Parties that have thus far been taken in 12 rounds of negotiation. At the periphery are a number of complementary and sometimes possibly diversionary activities. These include global governance initiatives in terms of creating usable science for policy makers through the Intergovernmental Panel on Climate Change (IPCC), a global community of local governance initiatives with respect to climate change through, for instance, the International Coalition for Local Environmental Initiatives, and a global community of non-State actors coalescing in their different interest groups. A recent circle of influence is the growing convergence between legal scholars and lawyers who are operating

at a number of fronts at once to push respect for the no-harm principle. They operate simultaneously through the publications of academic papers, detailed reports that support litigation and are engaging in public interest litigation at national and international level.

This recent surge of legal initiatives, being taken outside the framework of the UNFCCC, make it a highly interesting and topical subject for further discussion. This article reviews the academic literature and some court cases relating to climate change that are taking place worldwide. Following this assessment, this article briefly covers some other current and potential climate change related areas of litigation.

THREE PHASES OF LEGAL LITERATURE ON CLIMATE PRINCIPLES

The no-harm principle is a respected principle in international law, although it has had a somewhat chequered history.³ In the environmental field, it acquired legitimacy by being adopted within Article 21 of the Stockholm Declaration of the UN Conference on the Human Environment in 1972,⁴ and, subsequently, as Principle 2 of the Rio Declaration on the Environment and Development.⁵ It is repeated in the Preamble of the UNFCCC.

Over the last 15 years, one may argue that three concurrent trends in the climate change literature have

¹ United Nations Framework Convention on Climate Change (New York, 9 May 1992).

² Kyoto Protocol to the UNFCCC (Kyoto, 11 December 1997).

³ This principle was used in the *Trail Smelter Case* between Canada and the USA. See *Trail Smelter Arbitration (United States v. Canada)* [1941] 3 R.I.A.A. 1907. The no-significant-harm principle is also included in the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses (New York, 21 May 1997). Article 7 of that treaty states: 'Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states'.

⁴ Stockholm Declaration on the Human Environment (UN Doc.A/CONF.48/14, 16 June 1972), Principles 21 and 22.

⁵ Rio Declaration on Environment and Development (UN Doc. A/CONF.151/26/Rev.1, 13 June 1992), Principle 13.

developed, although each trend began partially in response to the implications of its predecessors.

The first trend, which dates back to 1988, is the adoption of the fuzzy definition of 'responsibility'. With the political recognition of the climate change problem in 1988, a number of political declarations on climate change were adopted that focused on the common but differentiated responsibilities of countries for emitting greenhouse gas (GHG) emissions.⁶ When I was conducting research for my Ph.D. thesis at this time, it was almost as if there was a tacit acceptance that the problem was a serious *global commons problem*. All countries were responsible for causing the problem and the initial political declarations and statements phrased this in a 'neutral factual statement', rather than with the intention of blaming specific countries.⁷ Thus, for example, the first report of the IPCC specified that: 'Industrialized countries and developing countries have a common responsibility in dealing with problems arising from climate change'. It goes on to state in neutral language that:

a major part of the emissions affecting the atmosphere at present originates in industrialized countries, where the scope for change is the greatest. Industrialized countries should adopt domestic measures to limit climate change by adapting their own economies in line with future agreements to limit emissions.⁸

Climate change was not seen as a case of transboundary harm for which those responsible for the emissions were asked to reduce their emissions and compensate others for the harm caused.⁹ In 1998, I argued that the responsibility concept had metamorphosed into a leadership concept presenting the developed world as leader and not as polluter. While the developing countries were focusing on the no-harm principle and the right to develop, the developed countries were focusing on finding ways to define the climate change issue in terms of the leadership paradigm rather than the pollution paradigm.¹⁰

While the framing of the problem as a global commons problem continued, the costs that effective leadership

would pose on developed countries (in terms of taking unilateral measures in the domestic contexts, which would negatively affect the competitiveness of domestic industry) led to the rise of the cost-effectiveness principle and the elaboration of market mechanisms. The cost-effectiveness principle is defined in the UNFCCC as follows:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.¹¹

Articles began focusing on how Joint Implementation, the Clean Development Mechanism and emissions trading under the Kyoto Protocol should be elaborated and how these mechanisms could be made most cost-effective and legally sound. By 1997, the political economy and legal literature were focusing on the use of market mechanisms in the international arena. The legal literature in this period focused on how market mechanisms could be developed to promote the cost-effectiveness principle. This trend continues today.

By 2000, there was a realization among some scholars that a cost-effective leadership process was unlikely to address the major impacts of climate change on developing countries (or the developed countries for that matter), and that autonomous adaptation and residual impacts were being taken for granted in the literature. The leadership paradigm was proving ineffective in the short term. This led to an increased focus on studying equity¹² and liability.¹³

If we look at the recent literature, there appears to be a rise in possible arguments for a potential case before the International Court of Justice (ICJ). It has been

⁶ See the Conference Statement of the Conference on the Changing Atmosphere: Implications for Global Security (Toronto, 30 June 1988); Declaration of the Hague (the Hague, 11 March 1989). See also Noordwijk Declaration on Climate Change (Noordwijk, 8 November 1989), which was adopted by the 67 countries attending the Atmospheric Pollution and Climatic Change Ministerial Conference held at Noordwijk, The Netherlands. See also Ministerial Declaration of the Second World Climate Conference (Geneva, 7 November 1990), which was adopted by the ministers and other representatives of 137 countries and the EC.

⁷ D. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', 18:2 *YJIL* (1993), 451, at 498.

⁸ Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Response Strategies* (WMO and UNEP, 1990), at xxvi.

⁹ J. Gupta, *The Climate Change Convention and Developing Countries – From Conflict to Consensus?* (Kluwer, 1997), at 135.

¹⁰ J. Gupta, 'Leadership in the Climate Regime: Inspiring the Commitment of Developing Countries in the Post-Kyoto Phase', 7:2 *RECIEL* (1998), 178.

¹¹ See UNFCCC, n. 1 above, Article 3(3).

¹² L. Rajamani, 'The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime', 9:2 *RECIEL* (2000), 120; and R. Anand, *International Environmental Justice: A North-South Dimension* (Ashgate, 2004).

¹³ See, e.g., E.M. Penalver, 'Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change', 38:4 *Nat. Resources J.* (1998), 563; D.A. Grossman, 'Warming up to a Not-So-Radical Idea: Tort Based Climate Change Litigation', 28:1 *Colum. J. Envtl. L.* (2003), 1; M. Allen, 'Commentary: Liability for Climate Change: Will it ever be Possible to Sue Anyone for Damaging the Climate?', 421:6926 *Nature* (2003), 891; A. Lipanovich, 'Smoke before Oil: Modelling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation is Feasible', 35 *Golden Gate U.L. Rev.* (2005), 429; K.L. Marburg, 'Combating the Impacts of Global Warming: A Novel Legal Strategy', *Colo.J.Int'l Envtl.L. & Pol'y 2001 Yearbook* (2002), 171; and R.W. Thackeray, 'Struggling for Air: The Kyoto Protocol, Citizen's Suits Under the Clean Air Act, and the United States Options for Addressing Global Climate Change', 14 *Indiana International and Comparative Law Review* (2004), 855.

argued that the ICJ will not be inclined to intervene in an on-going negotiation process at the international level, unless it can be demonstrated that at least some parties are not negotiating in good faith. Gillespie states:

Here is the nub: given the accepted goal of the FCCC and the current dismal position of the Kyoto Protocol, it is possible that this failure of good faith is occurring, especially when viewed from the perspective of the SIDS [small island developing States] given the limited time frame in which climate change is to be confronted.¹⁴

Even though the Protocol has since entered into force, there may be an opportunity for small island States to approach the ICJ directly or they could approach the ICJ indirectly via the General Assembly for an advisory opinion¹⁵ on climate change, arguing that the negative impacts of a slow negotiating process on the small island States can be potentially disastrous. There are of course risks, in that past decisions of the ICJ may not help one predict how it may judge in such a case.

Jacobs analyses what would happen if a small island State such as Tuvalu, an extremely small and highly vulnerable country, tried to bring a lawsuit against the USA in the ICJ. She argues that there might be jurisdictional problems since the USA could refuse to consent to the court's jurisdiction.¹⁶ But if such jurisdictional problems were overcome, Tuvalu could only possibly win the case if it can demonstrate successfully that the USA wrongfully caused or will cause damage to Tuvalu. At present, such analyses are academic and few of the small island States are contemplating such litigation, although some are following the literature quite closely. However difficult such litigation may be, there may be no choice for some of these countries except to go to court to seek justice. Verheyen¹⁷ submits, on the basis of four case studies of Nepal, Bhutan, the Cook Islands and China, that it may potentially be possible under some circumstances to seek justice at the international level on the basis of the argument of State responsibility and international liability for injurious

consequences for acts not prohibited by international law. She argues that to prove causation, courts may be willing to adopt the balance of probabilities test. She argues that even if all (potential) defendants are not included in a suit, a court may be in a position to determine joint and several liability, and the courts may, in the future, be willing to look at enhanced risk as opposed to actual damage.

Some other more creative opportunities are also explored in the literature. Legal causes of action against States that have not ratified the Kyoto Protocol could include the argument that such non-ratification implies an illegal subsidy to US companies or a violation of the United Nations Convention on the Law of the Sea (UNCLOS)¹⁸ or the Straddling Fish Stocks Agreement.¹⁹ Given the potential threat of litigation, it is also argued that industries should disclose their GHG emissions in their Securities and Exchange Commission (SEC) filings to minimize any future responsibility from either negative shareholder response or from future litigation.²⁰

LITIGATION AND THE UNDERLYING LEGAL ISSUES

LITIGATION IN THE USA

Since it became evident that the USA was unlikely to ratify the Kyoto Protocol in the short term, there has been a more active search for litigation opportunities within the USA.

One of the legal issues revolves around the authority of the US Environment Protection Agency (EPA) to regulate carbon dioxide (CO₂) as a pollutant; and whether it is under a statutory duty to regulate it. In 1999, the Committee on Science of the US House of Representatives discussed the question of whether CO₂ is a pollutant under the Clean Air Act (CAA)²¹ and whether the EPA had the power to regulate it. Despite the USA's formal reluctance to ratify the Kyoto Protocol, this question

¹⁴ A. Gillespie, 'Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility', 22:1 *UCLA Journal of Environmental Law and Policy* (2004), 107.

¹⁵ However, this would imply that the small island States would have to convince two-thirds of the members to agree with them; and the advisory opinion that may emanate from the ICJ would be more of legal advice than relief.

¹⁶ R.E. Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice', 14:1 *Pacific Rim Law and Policy Journal* (2005), 103; Jacobs suggests that it might be easier to sue the USA under the United Nations Convention on the Law of the Sea, if both countries acceded to it.

¹⁷ R. Verheyen, *Climate Change Damage in International Law*, Ph.D. Thesis, Faculty of Law, University of Hamburg (unpublished, 2003); R. Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff, 2005), at 230–232.

¹⁸ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982).

¹⁹ United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 December 1995). See W.C.G. Burns, 'The Exigencies that Drive Potential Causes of Action for Climate Change Damages at the International Level', 98 *ASIL PROC* (2004), 223. See also M. Doelle, 'Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change through the World Trade Organization', 13:1 *RECIEL* (2004), 85.

²⁰ E. Hancock, 'Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability for Global Climate Change and the SEC Disclosure Dilemma', 17 *Geo.Int'l Env'tl.L.Rev.* (2005), 223.

²¹ Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000).

was discussed because, as noted by the Committee on Science, '... an April 10, 1998 legal opinion on CO₂ issued by then EPA General Counsel Jonathan Z Cannon,²² has triggered concern about possible "back-door" implementation of the Protocol'.²³

Cannon had argued that CO₂ could be seen as an air pollutant under the CAA. The only issue was whether it was a threat to human health, welfare or the environment and, hence, whether the EPA had authority to regulate it. At the House of Representatives' hearing, some legal experts argued that CO₂ could be seen as a pollutant since it meets the definition of air pollutant under the CAA (Section 302(g)),²⁴ since Section 103(g)²⁵ recognizes CO₂ emissions from stationary sources as a pollutant. Others argued that CO₂ could not be regulated under the CAA because it would have consequences on the economy; Congress never explicitly gave such authority to the EPA; and there was a history during which Congress had regularly resisted imposing any restrictions on GHGs.

A couple of years later in 2003, Massachusetts, Connecticut and Maine initiated litigation against the US EPA. The petitioners submitted that CO₂ is a pollutant and should be listed under Section 108 of the CAA. In making this argument, the petitioners cited previous statements of the EPA in which it had seen the gas as a pollutant, and further submitted that the potential impacts of climate change could be substantial on the three petitioner States.²⁶ This case set a precedent since it was the first time that a US State was suing the federal government on global warming. Subsequently, this case was withdrawn for strategic reasons and the plaintiffs decided to challenge on a different case.²⁷

This other case was about whether the EPA had authority to regulate emissions from new motor vehicles. On 20 October 1999, the International Center for Technology Assessment and 19 other environmental groups requested the EPA to regulate emissions from new motor vehicles, as it was its duty to do so under

Section 202(a)(1) of the CAA.²⁸ The petition was based on the argument that motor vehicles emit a pollutant that contributes to air pollution and could put human health at risk. Although the petition was made during the Clinton Administration, the decision was ultimately taken under the Bush Administration. The new EPA General Counsel issued a memorandum in 2003 stating that the CAA does not give any authority to the EPA to regulate GHGs in order to address the global impacts. The memorandum made the point that all mention of GHGs under the CAA was only geared to greater research and understanding and not at regulating GHGs, and that the CAA is based essentially on the concept of ambient air quality standards and is thus not suited to deal with global warming.²⁹

In October 2003, the DC circuit consolidated all petitions into one case involving the Attorneys General from 12 States, three cities (including New York City), one island group (American Samoa) and several environmental non-governmental organizations (NGOs) that had challenged the EPA for failing to regulate GHGs. The petitioners in this case argued that the EPA's decision that it does not have the authority to regulate GHGs from new motor vehicles contravened Sections 202(1)(1), 302(g) and 302(h) of the CAA. However, in July 2005, the US Court of Appeals for the District of Columbia Circuit dismissed this case.³⁰ Some of the States and one city filed a Rehearing Petition; however, in December 2005, this case was also dismissed.³¹ In June 2006, the US Supreme Court agreed to rehear the case, in response to a Writ of Certiorari, and as this article is going to press the case will be heard by the US Supreme Court.

The question that remains is whether federal law pre-empts State controls over GHGs with respect to mobile sources. However, it is argued that nothing prevents States from taking measures with respect to GHGs from stationary sources.³²

It is pertinent here to note that, in 2005, Environment Canada made a proposal to include CO₂, methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF₆) in Schedule 1 to the Canadian Environmental Protection Act 1999.³³ These gases are now listed in Schedule 1 and

²² Memorandum from J.Z. Cannon, EPA General Counsel, to C.M. Browner, EPA Administrator, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (10 April 1998).

²³ Committee on Science, US House of Representatives Hearing Charter for Joint Hearing of the Sub-Committee on National Economic Growth, Natural Resources and Regulatory Affairs and Committee on Science, Sub-Committee on Energy and Environment, *Is CO₂ a Pollutant and does EPA have the Power to Regulate it?* (106th Congress, 1999), available at <http://www.house.gov/science/ee_charter_100699.htm>.

²⁴ 42 U.S.C. § 7602(g).

²⁵ 42 U.S.C. § 7403(g).

²⁶ 108 Complaint 06-04-03 (4 June 2003). The parties are Commonwealth of Massachusetts, State of Connecticut and State of Maine, plaintiffs versus Christine Todd Whitman, in her capacity as Administrator of the United States Environment Protection Agency.

²⁷ R. Meltz, 'Global Warming: The Litigation Heats Up', *Congressional Research Service Report for Congress* (Order Code RL 32764, Library of Congress, 2005).

²⁸ 42 U.S.C. § 7521(a)(1).

²⁹ Memorandum on EPA's Authority to Impose Mandatory Controls to Address Global Climate Change under the Clean Air Act, from R.E. Fabricant, General Counsel to M.L. Horinko, Acting Administrator (28 August 2003).

³⁰ *Commonwealth of Massachusetts v. EPA* 415 F.3d 50, DC Cir. (15 July 2005).

³¹ *Massachusetts v. EPA*, 433 F. 3d 66, DC Cir., 2 December 2005.

³² See R. Meltz, n. 27 above.

³³ Canadian Environmental Protection Act, S.C. (1999), c. 33. Order Adding Toxic Substances to Schedule 1 to the Canadian Environmental Protection Act 1999, 139:36 *Canada Gazette Part I* (3 September 2005), 2880.

thus can be regulated under Section 93 of the Act.³⁴ In the meanwhile, on 31 October 2006, Friends of the Earth Canada, Friends of the Earth International and the Climate Justice Programme have submitted an Opinion to the Compliance Committee and Environment Canada arguing that Canada is allegedly violating the UNFCCC and its Kyoto Protocol. Such a violation is seen as triggering action under Section 166 of the Canadian Environmental Protection Act.³⁵

In July 2004, a civil law suit was filed by eight US States,³⁶ New York City and several NGOs against five US power companies³⁷ that own 175 power plants. The suits were filed on the grounds that the 652 Mt of GHGs emitted annually by these companies amount to a public nuisance.³⁸ The case aimed to both protect State-owned property as well as the property of its citizens and residents (*parens patriae*). A separate private nuisance case was also filed by three non-State actors in the same court.³⁹ Several motions were filed by the defence, and the case was dismissed by the US District Court for the Southern District of New York on the grounds that the proceedings were barred by the political question doctrine.⁴⁰ The plaintiffs argued in their appeal that although the lower court did not rule on standing, the plaintiffs had *parens patriae*⁴¹ standing and could thus represent their own citizens in a public nuisance and that this protective interest is independent of the interests of private parties. They further argued that they must be able to 'vindicate a quasi-sovereign⁴² interest in the health and well-being

of their residents', and that the alleged injury would affect a sufficiently substantial part of their populations. They argued that the emissions from the defendants would lead to recognizable injuries, which were sufficiently imminent, and that the alleged emissions of the defendant were sufficient to establish standing. They also stated that reductions of these emissions would reduce injury and argued that they had the right to a federal judicial remedy in situations where other States and their residents cause harm to them. Finally, they argued that since the US Federal Government had no regulatory programme to regulate CO₂, common law remedies must be available.⁴³

The critical legal question was whether the plaintiffs had standing. Given that climate change may lead to injury to all peoples, and is possibly caused by actors all over the world, a second key question was whether causation could be proved. In his article on the subject, Mank argues that, under the US Administrative Procedure Act,⁴⁴ any individual who has been subject to injury, and has consequently suffered damage, has standing under the CAA.⁴⁵ He argues that damage to all cannot be seen as damage to none. This argument is also used in *Connecticut et al. v. American Electric Power Company Inc. et al.*, where it was argued that under federal common law all contributors to a common nuisance should be held liable. Mank submits that there is case law to support causality even where there is an 'attenuated line of causation'.⁴⁶

STATE RESPONSIBILITY FOR EXPORT CREDITS

Export credits have for a long time been controversial. These credits are provided to private companies to subsidize their exports and make them competitive in the international market. In the last decade, annual Organization for Economic Cooperation and Development export credit guarantees facilitated US\$17 billion of annual investments in fossil energy, which supported a total transfer of US\$200 billion, while only US\$0.8 billion was used to promote renewables.⁴⁷ However, although they have been often criticized in NGO literature, it is only recently that they have become subject to litigation with respect to climate change. Curiously, we are witnessing two cases – one in a country that has not ratified the Kyoto Protocol and one in a country that has ratified the Protocol.

³⁴ See Environment Canada, *Toxic Substances List – Updated Schedule 1 as of November 30, 2005* (Environment Canada, 2005), available at <http://www.ec.gc.ca/CEPARRegistry/subs_list/Toxicupdate.cfm>. See also *Fact Sheet: Greenhouse Gases, Climate Change and the Canadian Environmental Protection Act, 1999* (16 July 2005), available at <http://www.ec.gc.ca/press/2005/050716-2_b_e.htm>.

³⁵ See Climate Justice Programme, 'Legal Initiatives to Enforce Canada's Duty to Reduce Greenhouse Gas Emissions', press release (31 October 2006), available at <<http://www.climatelaw.org/media/Canada>>.

³⁶ These are Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin.

³⁷ These are American Electric Power Company Inc., American Electric Power Service Corporation, the Southern Company, Tennessee Valley Authority, Xcel Inc. and Cinergy Corporation.

³⁸ *State of Connecticut, et al. v. American Electric Power Company Inc., et al.* (2004) 406 F.Supp.2d. 265–274.

³⁹ *Open Space Inst. v. American Electric Power Co.*, No 04 CV 05670 (S.D.N.Y.), filed 21 July 2004.

⁴⁰ The political question doctrine implies that if an issue is a political issue being debated in political circles, a court may not have authority to decide on that issue. See Opinion and Order by the US District Court for the Southern District of New York in the case of the *State of Connecticut et al. v. American Electric Power Company, Inc. and Open Space et al. v. American Power Company, Inc.*, WL 22 49748 (S.D.N.Y.) (15 September 2005), not yet published.

⁴¹ The *parens patriae* principle implies the right of States to assess the needs of its people and to represent their interests in public nuisance cases.

⁴² Since the parties are not sovereign entities, they can only claim quasi-sovereign status with respect to protecting the interests of those living within their States.

⁴³ In the US Court of Appeals for the Second Circuit, *State of Connecticut et al. v. American Electric Power Co. et al.*; on Appeal from the US District Court for the Southern District of New York, 05-5104.

⁴⁴ The Administrative Procedure Act, 5 U.S.C., Sections 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

⁴⁵ B.C. Mank, 'Standing and Global Warming: Is Injury to All, Injury to None?', 35:1 *Environmental Law* (2005), 1.

⁴⁶ *Ibid.*, at 26.

⁴⁷ C. Maurer and R. Bhandari, *The Climate of Export Credit Agencies* (World Resources Institute, 2000).

In the US case, NGOs (Friends of the Earth, and Greenpeace) and the City of Boulder, Colorado initiated legal action in August 2002 against the US Export-Import Bank and the Overseas Private Investment Corporation (OPIC). They submit that a sum of US\$32 billion has been made available by these two US government agencies over a decade to companies to help them finance and insure oil fields, pipelines and coal-fired plants in developing countries without assessing the impacts on the environment including global warming.⁴⁸ On 23 August 2005, a federal judge in California ruled that the plaintiffs had legal standing in the lawsuit in order to challenge the federal government's role in taking action on climate change. It also concluded that OPIC's statute does not preclude judicial review and that the environmental procedures in OPIC's statute do not replace the National Environmental Protection Act.⁴⁹ The case has since been heard in the US District Court for the Northern District of California and a decision is pending.

In Germany, NGOs (Germanwatch and Bund für Umwelt und Naturschutz Deutschland) initiated legal action against government agencies (the Federal Republic of Germany represented by Federal Ministry of Economics and Labour) that provided export credits to Euler Hermes AG on the grounds that such credits have led to increased GHG emissions elsewhere in the world. The NGOs called for disclosure of information about such projects since 1997. In the first week of February 2006, the parties agreed to settle the case on the basis of a court order stating that government agencies must make information available with respect to projects with a value of more than 15 million euros, which have lasted more than 2 years and have been supported through export credits (in this case since 2003). Although the court specified that this was a settlement and not intended to create a legal precedent, the settlement was based on the interpretation that the new German Access to Environmental Information Act 2004 (as transposition of the new EC Directive 2003/4/EC)⁵⁰ is applicable and that the information requested regarding climate impacts of export credit guarantees is 'environmental information' for the purpose of the law. The order also stresses that no

exceptions as foreseen by the EC Directive and the German law apply.⁵¹

GREENHOUSE GASES COULD HAVE 'SIGNIFICANT ENVIRONMENTAL EFFECTS'

At the other end of the globe, similar debates are taking place. In an Australian case, the Australian Conservation Foundation, WWF Australia, Environment Victoria and the Climate Action Network Australia have argued that a minister did not have the authority to prevent a planning body from examining the GHG emissions from a mine expansion project before it decided to approve the decision.⁵² The Victoria Civil and Administrative Tribunal ordered in favour of the plaintiffs. Although this was an administrative law question that focused more on the power granted in legislation, the tribunal noted that:

Many would accept that, in present circumstances, the use of energy that results in the generation of some GHGs is in the present interests of Victorians; but at what costs to the future interest of Victorians? Further the generation of GHGs from a brown coal power station clearly has the potential to give rise to 'significant' environmental effects.⁵³

Another recent Australian case refers to the damage potentially caused to the Great Barrier Reef by climate change. In July 2005, the Wildlife Preservation Society of Queensland – Prosperpine/Whitsunday Branch instituted legal proceedings against the Australian Government for not taking into account the potential impacts of global warming on a highly sensitive ecosystem – the Great Barrier Reef and the Wet Tropics of Queensland World Heritage Sites.⁵⁴ However, the minister argued that he had taken the impacts of climate change into account but did not think that the mines could have a significant impact on the Reef. The discussion then took a technical turn to discuss what was a significant impact. The application was dismissed in June 2006 on the grounds that the cause–effect relationship was

⁴⁸ *Friends of the Earth, Greenpeace, Inc. and City of Boulder Colorado v. Overseas Private Investment Corporation, Export-Import Bank of the United States*, filed in the US District Court for the Northern District of California (26 August 2002).

⁴⁹ See Order Denying Defendants' Motion for Summary Judgment, in *Friends of the Earth, Greenpeace, Inc. and City of Boulder Colorado v. Peter Watson (Overseas Private Investment Corporation) and Phillip Lerrill (Export-Import Bank of the United States)* (2002) 35 Env'tl. L. Rep. 20, 179.

⁵⁰ Gesetz zur Neugestaltung des Umweltinformationsgesetz und zur Änderung der Rechtsgrundlagen zum Emissionshandel vom 22 Dezember 2004, in force since 14 February 2005, BGBI. I, at 3704. See also EC Directive 2003/4/EC of 28 January 2003 on access to environmental information, [2003] OJ L41/26.

⁵¹ See VG 10A 215.04 Verwaltungsgericht Berlin based on the unofficial translation of the German original by the Climate Justice Programme (3 February 2006). The Court Order is published in *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* (2006), at 850, and see the following article for an evaluation of it: W. Mecklenburg and R. Verheyen, 'Informationen über Exportförderungen als Umweltinformationen', *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* (2006), 781.

⁵² *Australian Conservation Foundation v. Minister of Planning* (2004) 140 LGERA 100, available at <<http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2029.html>>.

⁵³ *Ibid.*, at para. 43.

⁵⁴ *Wildlife Preservation Society of Old Prosperpine/Whitsunday Branch Inc. v. Minister for Environment and Heritage & Bowen Central Coal Management Pty Ltd & Coal Pty Ltd* (Federal Court proceedings No QUD216, 2005), available at <<http://www.climatelaw.org/media/Australia.emissions.suit>>.

weak.⁵⁵ In a separate report it is argued that the coral reefs in Australia are seen as world heritage and the non-ratification of the Kyoto Protocol is seen as amounting to a violation of the World Heritage Convention.⁵⁶

LEGAL ACTION IN DEVELOPING COUNTRIES

Interestingly, there is also climate change related litigation ongoing in developing countries that have ratified the Kyoto Protocol, such as Nigeria. In June 2005, various Niger River delta communities began legal proceedings against the oil companies working in the delta area (including Shell Petroleum Development Company of Nigeria Ltd, Total/Fina/Elf Ltd, Nigeria Agip Oil Company Ltd, Chevron/Texaco Nigeria Ltd, Mobil Producing Nigeria Unlimited, and Nigerian National Petroleum Corporation) and the Nigerian Attorney-General, requesting them to stop flaring gas as such activities lead to the emission of over 70 million tonnes of CO₂ annually. They stated that these activities constituted a violation of the fundamental right to life and dignity of human beings under the Constitution of Nigeria 1999⁵⁷ (Articles 33(1) and 34(1)); are a violation of the right to live in dignity and enjoy the best attainable state of physical and mental health; and are a violation of the right to a satisfactory environment favourable to their development (under Articles 4, 16 and 24 of the African Charter of Human and Peoples' Rights Act).⁵⁸ They further argued that provisions of the Nigerian Environmental Impact Assessment Act⁵⁹ were contravened since no environmental impact assessment was carried out as required.⁶⁰ Since then, the original case was withdrawn for strategic reasons and separate cases were filed in different Nigerian States where the gas flaring is taking place. In one of these cases, the Nigerian Federal High Court has ruled in favour of the plaintiffs and ordered that the gas flaring must be halted.⁶¹ Shell Nigeria has appealed the decision

and, subsequently, a contempt of court proceeding against Shell and the Nigerian National Petroleum Corporation has been filed as the flaring has continued despite the court order.⁶²

Relying on the language in Article 6 of the UNFCCC on education, training and public awareness, a court case was also initiated against the Government of Argentina in the aftermath of the Santa Fe floods in 2003. Citizens used Article 6 of the convention and the Argentine right to information to show that protective measures for citizens was not undertaken. Article 6 of the convention calls on all nations to promote education, training and public awareness in the area of climate change and its effects.⁶³

While there have been no direct cases focusing on climate change in India, local air pollution has led to environmental litigation before the Supreme Court of India with respect to the emissions of buses and cars. The courts called for a fuel switch in public transport in New Delhi (with spill-over effects around the capital) and the phasing out of older commercial vehicles⁶⁴ and the introduction of specific standards for cars. In the latter case, all cars in the National Capital Region of New Delhi can now only be registered if they conform to the Euro II emission standard, which was the standard applicable at the time in the EU. By potentially affecting 15% of the total new cars in India, this will likely have a major impact on the industry. Given that India has always had a very active environmental community and that public interest litigation and judicial activism are common in India, it is not so very far-fetched to imagine that climate litigation may reach the Indian courts in the future.

INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

Internationally, a case has been initiated by the Inuit Circumpolar Conference in the Inter-American Court of Human Rights. The case was filed by Sheila Watt-Cloutier on behalf of 62 named petitioners representing Inuit peoples in the USA and Canada. It cites moderate case GHG emission scenarios and their

⁵⁵ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment & Heritage and Others* [2006] FCA 736.

⁵⁶ *Global Climate Change and the Great Barrier Reef: Australia's Obligations Under the World Heritage Convention*, A Report prepared by the Sydney Centre for International and Global Law (Faculty of Law, University of Sydney, Australia, 2004), available at <http://www.cana.net.au/SCIGL_greatbarrierreef_Final_Report_210904.pdf>.

⁵⁷ CAP C23 Constitution of the Federal Republic of Nigeria (Promulgation Act) 1999.

⁵⁸ African Charter of Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981).

⁵⁹ Environment Impact Assessment Act, Cap. E 12, Vol. 6, Laws of the Federation of Nigeria, (2004).

⁶⁰ *Barr. Ikechukwu Okpara et al. v. Shell Petroleum Development Company of Nigeria Ltd et al.* (Suit No FHC/CS/B/126/2005, 20 June 2005), filed in the Federal High Court of Nigeria, in the Benin Judicial Division.

⁶¹ *Jonah Gbemre v. Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney General of the Federation*, Decision of the Federal High Court of Nigeria in the Benin Judicial Division Holden at Court Benin City (Suit No FHC/B/CS/53/05, 14 November 2005).

⁶² Contempt of court proceedings against Shell, published by the Climate Justice Programme (16 December 2005), available at <<http://www.climatelaw.org/media/nigeria.shell.contempt.dec05>>.

⁶³ See also R. Verheyen, *Climate Change in Courts Worldwide*, paper presented to the Conference on Kyoto Plus – Escaping the Climate Trap (28–29 September 2006), organized by Heinrich Boll Stiftung, Wuppertal Institute for Climate, Environment and Energy, WWF and European Climate Forum.

⁶⁴ S.C. Writ Pet. (Civil), *M.C. Mehta v. Union of India* (29 July 1998), No 13029/1985, AIR 1998 SC 2963, available at <<http://www.elaw.org/resources/text.asp?ID=1051>>; S.C. Writ Pet. (Civil), *M.C. Mehta v. Union of India* (5 April 2002), No 13029/1985, AIR 2002 SC 1696, available at <<http://www.elaw.org/resources/text.asp?ID=1102>>.

potential impacts on the Arctic, and claims that these impacts will disrupt and possibly destroy the culture and economy of Inuit peoples. They argue that as the USA is the largest contributor of GHG emissions in the world and as it has been unwilling to participate in the Kyoto Protocol, it has allegedly violated its environmental law obligations in terms of not causing harm to other countries and peoples and has violated the human rights of the Inuit people, both under national and international law. The petitioners based their case as a violation of human rights under the American Declaration of the Rights and Duties of Man.⁶⁵ The petition requests the court to visit the Inuit people to witness the harm that they have endured, to investigate the claims in the petition, and to report on the facts and the applicable law. It requests the court to recommend that the USA adopt measures to reduce its GHG emissions, incorporate an assessment of the impacts on the Arctic before approving government actions, develop a plan to protect the culture and biodiversity of the Inuit, help them adapt to the potential unavoidable impacts and provide other appropriate relief.⁶⁶

LISTING MONUMENTS AND SPECIES AS ENDANGERED

Meanwhile, Nepal, Belize and Peru have petitioned the United Nations Educational, Scientific and Cultural Organization (UNESCO) to list specific domestic sites (namely Everest National Park, Belize Barrier Reef and Huarascán National Park respectively) in the List of World Heritage in Danger under the Convention on World Heritage.⁶⁷ It is anticipated that this will strengthen any future case initiated to protect these vulnerable sites at the international level.⁶⁸ On 16 February 2006, 12 NGOs⁶⁹ from USA and Canada led by the International Environmental Law Project of the Lewis and Clark Law School in the USA submitted a petition to the World Heritage Committee to list the transboundary Waterton-Glacier International Peace Park on the List

of World Heritage Sites in Danger as a result of the impacts of climate change.⁷⁰ This action has led to the adoption of a climate change strategy by the World Heritage Committee. In a press release, the World Heritage Committee has stated:

The World Heritage Committee on Monday adopted the recommendations on ways to respond to the threat of climate change to many World Heritage sites such as Mount Everest (Sagarmatha National Park in Nepal), Australia's Great Barrier Reef and Venice (Italy).

'This is the start of a long process, which is important in that it helps draw attention to a far reaching issue,' explained the Chairperson of the World Heritage Committee, Ina Marčiulionytė, Lithuania's Ambassador and Permanent Delegate to UNESCO. 'Clearly, the causes and the effects of climate change cannot be solved in terms of World Heritage properties alone. But it is our duty to do whatever we can to protect World Heritage in keeping with our responsibility to implement the World Heritage Convention. This is what we are trying to do by initiating "more studies and sharing experience".'⁷¹

It is not only in international contexts, but also in domestic contexts, that such requests are being made. There are reports that species (including coral species and the polar bear) whose existence is being endangered by climate change are in the process of being put on formal lists in the USA. Sometimes the initiatives are taken by authorities, while at other times they require petitions to the appropriate authorities. Although these international and national actions to list species and locations as endangered are not, strictly speaking, litigation, they are seen by legal activists as a first critical step towards creating the basis for future litigation. While in domestic contexts, such listing might impose legal requirements on actors to not endanger the lives of listed species, at the international level, such an obligation is of a much weaker order.

(POTENTIAL) LEGAL ACTIONS

The following table sums up the types of legal actions that are taking place currently.

A number of options are still being considered in the literature, as has been indicated throughout this article, and these may potentially mature into litigation in the future. These are presented in table 2.

⁶⁵ American Declaration of the Rights and Duties of Man (Bogotá, 30 April 1948), O.A.S. Res. XXX, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (OAS/Ser.L/V/II.4 Rev. 9, 2003); 43 AJIL Supp. 133 (1949).

⁶⁶ Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

⁶⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage (Stockholm, 16 November 1972), Article 11.4.

⁶⁸ See Climate Justice Programme, *UNESCO Danger-Listing Petitions Presented* (17 November 2004), available at <<http://www.climatelaw.org/media/UNESCO.petitions.release>>.

⁶⁹ The petitioners include Center for Biological Diversity, David Suzuki Foundation, Defenders of Wildlife, Defenders of Wildlife-Canada, ForestEthics, Green House Network, Humane Society International/Humane Society of the United States, International Environmental Law Project, Montana Wilderness Association, the Pembina Institute, Wildlands CPR (Center for Preventing Roads) and Yellowstone to Yukon Conservation Initiative.

⁷⁰ Petition to the World Heritage Committee Requesting Inclusion of Waterton-Glacier International Peace Park on the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures and Actions, prepared by the International Environmental Law Project of Lewis and Clark Law School (16 February 2006), available at <<http://www.climatelaw.org/media/UNESCO%20-%20Waterton-Glacier%20International%20Peace%20Park%20petition>>.

⁷¹ Press release entitled 'World Heritage Committee Adopts Strategy on Heritage and Climate Change' (10 June 2006), published by World Heritage, also available at <<http://whc.unesco.org/en/news/262>>.

TABLE 1 LEGAL ACTIONS IN DIFFERENT PARTS OF THE WORLD

SUBJECT	TYPE OF ACTION	COUNTRY	DESCRIPTION
Export credit	Freedom of information	Germany	Export credit agencies are not providing information about GHG emissions from their projects
Mine expansion	Environment impact assessment Breach of statutory duty; environment impact assessment	USA Australia	Export credit agencies violate national laws Action claiming that a minister did not have the power to prevent the assessment of GHGs from a project
Coral reefs	Breach of statutory duty; environment impact assessments	Australia	Action claiming that the Government has failed to take into account the impacts on, <i>inter alia</i> , coral reefs
Gas flaring	Violation of human rights and environmental obligations	Nigeria	Communities are suing the major oil companies for gas flaring resulting in increased local pollution and GHG emissions
Public information	Freedom of information	Argentina	Citizens used Article 6 of the convention and their right to information to show that infrastructural protective measures for citizens were not undertaken
Power companies	Common law nuisance	USA	Some states and NGOs are suing five major power companies for nuisance
GHGs	CO ₂ should be seen as pollutant; pollution regulatory functions	USA	States have sued the EPA for failing to regulate CO ₂ as a pollutant
GHG emissions	Violation of human rights	USA	Inuit Community claims that the USA is violating their human rights before the Inter-American Court of Human Rights
World Heritage sites	Enlisting as World Heritage in Danger under World Heritage Convention	Nepal, Peru, Belize, Canada, USA	Requesting UNESCO to grant status as World Heritage in Danger (Everest National Park; Barrier Reef; Huarascán National Park; Waterton-Glacier International Peace Park)

TABLE 2 POTENTIAL LEGAL AVENUES DISCUSSED IN THE LITERATURE

NATURE OF ACTION	COUNTRY	DESCRIPTION	SUGGESTED BY
Request the ICJ for an advisory opinion	Small island States*	Request the ICJ to give an advisory opinion on whether the climate change negotiations are being conducted in good faith and protecting the most vulnerable countries	Gillespie ⁷²
Violation of UNCLOS	Developing countries/EU	Failure to ratify the Kyoto Protocol amounts to violation of UNCLOS	Burns; ⁷³ Doelle ⁷⁴
Violation of no harm principle	Small island developing States	Tuvalu could sue the USA before the ICJ on grounds of the no-harm principle	Jacobs ⁷⁵
Disclose emissions to SEC	USA	Companies should disclose emissions to SEC to limit liability	Hancock ⁷⁶

⁷² See A. Gillespie, n. 14 above.⁷³ See W.C.G. Burns, n. 19 above.⁷⁴ See M. Doelle, n. 19 above.⁷⁵ See R.E. Jacobs, n. 16 above.⁷⁶ See E. Hancock, n. 20 above.

COORDINATED AND ORCHESTRATED OR AD HOC ACTIONS

There is a growing civil society community that has begun to collaborate to identify the potential for domestic and international litigation as a way to push for climate justice, especially for those who have made little or no contribution to the problem. There is an epistemic community and an NGO community based in 29 countries that have joined forces under the Climate Justice Programme, whose main goal is to promote global respect for the no-harm principle, which is a principle that has long been recognized in international law, but that has been a casualty of the 'global commons' framing of the problem. By framing the issue of climate change as a global commons problem, and by using 'neutral language' when talking about the responsibilities of countries, there has been little focus on holding those specific actors with high GHG emissions responsible and thereby putting future emitters on notice. Haas argues on the basis of his research that the rise of transnational epistemic communities that work together in developing common science is leading to convergent State policies in different parts of the world. He argues that these communities both have influence on policy-making processes at the international level and also at the domestic level.⁷⁷ Drawing inspiration from this idea, one could generate a new hypothesis that transnational epistemic communities of legal scholars and lawyers may promote legal principles and concepts simultaneously at the national and international level through legal scholarship and the use of litigation and that such promotion may lead to similar court judgments in national courts in different parts of the world using similar principles, doctrines and often referring to case law in other countries.

CONCLUSION

This article outlines a number of new legal trends. First, it shows that there is an active search for legal causes of action to take governments and other social actors to task for not taking their responsibility with respect to global environmental problems seriously. Second, this phenomenon is not just confined to those countries that have not ratified the Kyoto Protocol, but is spreading to the countries that have ratified the Protocol as well. Third, this is not, strictly speaking, a First World phenomenon only, as the developing country courts are also addressing these issues. Fourth, it is not just these cases, but the potential threat of future litigation that might itself give strong incentives to

governments to address climate change more seriously. Verheyen⁷⁸ argues that this might itself lead to a call for a streamlined liability protocol under the UNFCCC, rather than expose the private sector and governments to a variation in legal rules in different jurisdictions.

Many of the arguments underlying the potential bases for international claims against the USA rests on the argument that the USA is not negotiating and dealing with climate change in good faith. However, some may argue that the large number of international initiatives that the USA supports, as well as the substantial financial resources it channels into the UNFCCC, demonstrate its good faith. One could also submit that the proactive preventive actions being taken by local and provincial authorities also demonstrate that the USA is taking action. Since many States in the USA have higher emissions than smaller industrialized countries,⁷⁹ it is effective for them to take action, especially if they have the political support. Since they are seen as 'laboratories of democracy' and can influence national policy,⁸⁰ they can be seen in a very positive light. For example, New York State aims to reduce its GHGs emissions by 5% by 2010 and 10% by 2020 with respect to 1990 levels. In 2001, the New England Governors and Eastern Canadian Premiers adopted a climate change plan for Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island and Quebec to reduce their emissions by 10% by 2020 with respect to 1990 levels. California has adopted targets to reduce its GHG emissions to 2000 levels by 2010, to 1990 levels by 2020 and to reduce by 80% below 1990 levels by 2050.⁸¹

However, it is possible that the counter-argument, that the rise in interest of the USA in bilaterally orchestrated international agreements may not demonstrate that the USA is negotiating international policies on climate change in good faith or that it is complying with the qualitative obligations under the UNFCCC, is valid. Even if it were to demonstrate good faith, this would probably still not imply that suits under nuisance law would be pre-empted under domestic law.

At the same time, while these legal cases may try and promote the no-harm principle, there may also be

⁷⁸ See R. Verheyen, n. 17 above.

⁷⁹ New, York, Texas, California, Ohio and Pennsylvania have higher emissions than the Netherlands, Belgium, Austria and Denmark. See Centre for Clean Air Policy, *State and Local Climate Change Policy Actions* (Centre for Clean Air Policy, 11 October 2002), at 1.

⁸⁰ *Ibid.*, at 1.

⁸¹ See Executive Order # S-3-05 (1 June 2005), which lists these targets. See, for more details, the website of the Government in California on the issue of climate change, available at <http://www.climatechange.ca.gov/climate_action_team/>. See also David Suzuki Foundation and Pembina Institute, *The Case for Deep Reductions: Canada's Role in Preventing Dangerous Climate Change* (David Suzuki Foundation and Pembina Institute, 2005), at 3–4, available at <http://www.davidsuzuki.org/files/climate/Ontario/Case_Deep_Reductions.pdf>.

⁷⁷ P.M. Haas, 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control', 43:3 *International Organization* (1989), 377.

litigation that is not environment friendly or may be against the interests of developing countries. For instance, some argue that litigation in the area of emissions trading within the EU may slow down the process of further developing the mechanism. But, more importantly, potential international dispute resolution (arbitration) in the area of the Clean Development Mechanism may increase the costs of participating in such projects for developing countries, often making these projects non-viable. Legal insurance against such potential litigation may be one option to protect against such litigation.

Meanwhile, reports from various legal jurisdictions across the globe continue to come in about cases or policy approaches in which climate change plays a role. These cases include decisions by a court in New Zealand to allow an appeal in a case where a wind farm was refused permission under a national law, using GHG emissions as an argument.⁸² Another case in the USA has been initiated by the State of California in September 2006 for damages against six car companies

for public nuisance.⁸³ Within the legal community, there is a growing conviction that ultimately local, if not global, environmental justice will require courts to play a critical role in putting pressure on the legislature and executive.

Joyeeta Gupta is Professor at the Vrije Universiteit Amsterdam and at UNESCO-IHE Institute for Water Education in Delft. She has published extensively in the area of climate change.

The author would like to acknowledge correspondence with legal scholars and lawyers engaged in the debate, including Roda Verheyen and Herman Ott from Germany, Peter Roderick from the UK and Kirsty Ruddock from Australia. This article has been written as part of the project on 'Inter-Governmental and Private Environmental Regimes and Compatibility with Good Governance, Rule of Law and Sustainable Development' (contract 452-02-031), which is financially supported by NWO, the Netherlands Organization for Scientific Research.

⁸² See R. Verheyen, n. 63 above.

⁸³ *People of the State of California v. General Motors Corporation, Toyota Motor North America Inc., Ford Motor Company, Honda North America Inc., Chrysler Motors Corporation, Nissan North America Inc.* (Case no C-06-05755), filed 20 September 2006.